No. 317

# In the Supreme Court of the United States

Term, 19

RUTH DAVIS, as Administratrix for JOHN F. DAVIS, Deceased, Trustee of the Estate of Cumseh Bear, Deceased, *Petitioner*,

vs.

MARY JONES, Administratrix of the Estate of Cumseh Bear, Deceased; ALICE BEAR, Guardian of Janie Alene Bear; ROSINA LOUISE BEAR, JOHN ALLEN BEAR and IVAN EUGENE BEAR, minors; and UNITED STATES OF AMERICA, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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*Attorney for Ruth Davis, Administratrix of John F. Davis, deceased.*

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**IN THE SUPREME COURT OF THE UNITED STATES,**

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**No. .....**

**..... Term, 19.....**

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**RUTH DAVIS, as Administratrix for JOHN F. DAVIS, Deceased, Trustee of the Estate of Cumseh Bear, Deceased,** ***Petitioner.***

**vs.**

**MARY JONES, Administratrix of the Estate of Cumseh Bear, Deceased; ALICE BEAR, Guardian of Janie Alene Bear; ROSINA LOUISE BEAR, JOHN ALLEN BEAR and IVAN EUGENE BEAR, minors; and UNITED STATES OF AMERICA,** ***Respondents.***

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.**

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Your petitioner respectfully shows that she is the duly appointed administratrix of the Estate of John F. Davis, now deceased and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on the 11th day of April, 1958. Order of May 8, 1958 denied rehearing. Time for filing petition for certiorari was extended by Mr. Justice WHITTAKER to September 1, 1958, by order of July 29th, 1958. Case revived July 28, 1958, in Ruth Davis, administratrix. See Transcript accompanying petition.

## Opinion Below.

The findings of fact and conclusions of law of the trial court are embodied in the transcript Vol. 1, Page 65, for findings of fact and Vol. 1, Page 73, for conclusions of law.

The opinion of the Circuit Court of Appeals is reported in 254 Fed. 2d, Page 696 and is also set out in the transcript of the Clerk of the Court of Appeals at page 4. Opinion is also in Appendix, hereto attached.

## Jurisdiction.

Jurisdiction is invoked under Title 28 U. S. C. A., Sec. 1254.

Jurisdiction of trial court was claimed by respondents under Section 3 of the Act of Congress of April 12, 1926, 44 Stat. 239, but petitioner denied such Act conferred jurisdiction and unsuccessfully moved to remand. See Vol. 1 of Transcript, Page 54.

## Questions Presented.

1. Did the approval in 1932 of the trust agreement here in issue by the County Court of Okfuskee County, Oklahoma, operate to remove all federal restrictions?

2. Did the Interior Department by Order relinquish all departmental supervision?

3. Was the trust agreement void?

4. Did the Act of January 27, 1933, 47 Stat. 777, have the effect of reimposing restrictions?

## Federal Statutes Involved.

(A) *Section 9, Act of May 27, 1908* (35 Stat. 312):

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: PROVIDED, That no conveyance of any interest of any fullblood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

(B) *Section 3, Act of April 12, 1926* (44 Stat. 239):

"Any one or more of the parties to a suit in the United States Courts in the State of Oklahoma or in the State Courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extention thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved."

(C) *That part of the Act of January 27, 1933* (44 Stat. 777) reading:

"* * * That all trust agreements or contracts made or entered into prior to the date of approval of this Act, and all contracts or agreements made or entered into prior to said date providing for or looking to the

creation of such trust or trusts shall be null and void unless such contracts or agreements shall have heretofore been approved by the Secretary of the Interior."

**Statement.**

We have here a question of construction of certain Acts of Congress pertaining to Indians of the Five Civilized Tribes in Oklahoma. One Cumseh Bear, enrolled as a full-blood Indian of the Creek Tribe became the owner by inheritance of a one-half interest in his deceased wife's allotment. Her lands had been leased under departmental supervision for oil and gas mining purposes in her lifetime and was producing oil at the time of her death. Cumseh executed a trust agreement with John F. Davis, now deceased, whereby Davis, as trustee, was to collect and manage the income for the use and benefit of Cumseh. That agreement was approved in compliance with the provisions of applicable federal laws on August 27, 1932. Tr. Vol. 1, page 59. The legal section of the Indian Office at Muskogee was furnished with a certified copy of the order of the county court of Okfuskee County approving the said trust agreement and the Superintendent of the Indian Office was advised that the approval of this agreement operated to remove all federal restrictions on the income accruing to Cumseh. Tr. Vol. 2, Pages 234-241. Following that approval and the opinion of the law department Superintendent Landman addressed a letter to the Tidewater Oil Company stating that all federal supervision was relinquished over the one-half interest in the income accruing to Cumseh Bear. Tr. Vol. 2, Page 241. Copies of Mr. Landman's letter relinquishing supervision were sent to

the U. S. F. & G. Co. bondsmen for the trustee, U. S. Field Clerk at Okmulgee, John F. Davis, trustee and the Commissioner of Indian Affairs. Tr. Vol. 2, Page 242. The trustee received and administered a total of $57,958.26 in the period during which he acted as trustee. Tr. Vol. 1, Page 73. All of that came from oil royalties (except about $375.00) accruing subsequent to the approval of the trust. Nothing came from the Department of the Interior from income paid prior to the creation of the trust. Cumseh died September 19, 1954. Tr. Vol. 1, Page 2. Davis filed his final report April 13, 1955. Tr. Vol. 1, Page 2. It was contested by the heirs and by the United States Government. The case was removed from the district court of Okfuskee County, Oklahoma to the United States Court for the Eastern District of Oklahoma on motion of the United States. Tr. Vol. 1, Page 49. Removal was based on the alleged application of Section 3 of the Act of Congress of April 12, 1926, above quoted. Counsel for the trustee filed motion to remand on the ground that the funds involved became free of federal restrictions upon approval of the trust agreement by the county court. Tr. Vol. 1, Page 51. That motion was overruled. Tr. Vol. 1, Page 54. The case went to trial in the United States Court with the heirs and the government contesting all disbursements by the trustee above $100.00 per month. See objections of heirs. Tr. Vol. 1, pages 36-48. Objections of Government. Tr. Vol. 1, pages 54-57. Both the heirs and the Government prayed for judgment over against the trustee for a total of $31,035.44. Tr. Vol. 1, Page 56. Judgment was for contestants for $31,858.26 Tr. Vol. 1, Page 75. The court held as a matter of

law: (a) that the lands were restricted; (b) that prior to the Act of Congress of January 27, 1933, 47 Stat. 777, there was no authority to create trusts; (c) that the approval by the county court did not remove any restrictions; that the trust agreement was wholly void and, (d) that the order of Superintendent Landman relinquishing supervision did not effect a removal of the restrictions from the land or the proceeds therefrom. Tr. Vol. 1, pages 73-75.

The court will find a stipulation in which several matters were agreed upon by the parties. Tr. Vol. 1, pages 58-60.

There was an issue as to whether the trust agreement had deletions in certain paragraphs or whether the true instrument was the one that had no deletions. The trustee contended that the deleted agreement was the one that applied. Copy of it is attached to Trustee's final report. Tr. Vol. 1, Pages 27-35. The trial court held to the contrary. Findings of Fact, Tr. Vol. 1, Pages 65-73. From a judgment against the trustee for $31,858.26, the trustee appealed and the court of appeals affirmed. In due time petition for a rehearing was filed in the Court of Appeals. It was denied May 8, 1958.

**Reasons For Granting the Writ.**

1. It is believed that there is here presented a federal question, not heretofore passed upon by this Court, but which should be passed upon because of its bearing on some three Acts of Congress that deal with the administration of the affairs of the Five Civilized Tribes of Indians in Oklahoma. A reference to those acts is herein

made under the title "Statutes Involved." The trial court and the Tenth Circuit Court of Appeals has here held that a contract (trust agreement) duly approved by a county court as to inherited lands made by a fullblood Indian heir is void because not approved pursuant to Section 2 of the Act of Congress of January 27, 1933, 44 Stat. 777, although it was approved under Section 9 of the Act of Congress of May 27, 1908, 35 Stat. 312, months before the passage of the 1933 Act.

2. It is believed the decision of the Circuit Court of Appeals is contrary to decisions of this Court. Section 9 of the Act of May 27, 1908, above quoted, provides that death of an allottee of the Five Civilized Tribes operates to remove all restrictions upon alienation, provided that no conveyance of any interest by heirs of the fullblood shall be valid unless approved by the county court of the county having jurisdiction of the estate of the deceased allottee. Here the county court approved the agreement in issue prior to the passage of the Act of Congress of January 27, 1933. This Court and the Oklahoma Supreme Court has construed Section 9 in many cases.[1] Under this section of the basic Act dealing with alienation approval by the county terminates all restrictions.

3. It is respectfully pointed out that the trial court and the court of appeals fell into the same error in failing

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1. *Parker* v. *Richards*, 250 U. S. 235, 63 L. ed. 740; *Hope* v. *Foley*, 157 Pac. 727, 57 Okl. 513; *Chapco* v. *Chapman*, 247 U. S. 506, 62 L. ed. 1240; 170 Pac. 259. In *U. N. v. Hinkle*, 261 Fed. 518, the Circuit Court of Appeals of the 8th Circuit said: "The last restriction on the alienation of the land was removed by the sale thereof with the approval of the county court."

to give any effect to Section 9, *supra* and to the undisputed fact that the trust instrument here in issue was duly approved pursuant to the provisions of said Section 9 before the passage of the 1933 Act of Congress. The trial court in a clear cut statement in its conclusion of law said "the approval did not add or detract from the rights of the respective parties." See Section 4, Tr. Vol. 1, page 74. Again in the conclusions of law it was said: "Prior to the enactment of the Act of January 27, 1933, 44 Stat. 777, there was no authority for a restricted Indian to enter into a valid Trust Agreement * * *." Again in the same paragraph is the statement that "the agreement, not having been approved by the Secretary of the Interior, was and is wholly void." Tr. Vol. 1, page 74.

Thus it clearly appears that the trial court proceeded all along on the belief that the trust agreement was wholly void and conferred no rights on the trustee or anyone else. That was a most serious error and was the very basis of the judgment against the trustee for $31,858.26. The court overlooked the fact that the lands involved were inherited land over which the county court (not the Secretary) had exclusive authority to approve conveyances. Under Section 22 of the Act of April 26, 1906, 34 Stat. 137, the Secretary had authority to approve conveyances of inherited land made by heirs of the fullblood but Section 9 of the Act of May 27, 1908, transferred that function to the county courts of Oklahoma. A mortgage has been held to be an interest. *Tiger v. Sellers*, 145 F. 2d 920. An oil and gas lease has been held to be such an interest as requires approval under Section 9. *Pluto Oil Co.* v. *Miller*, 219 Pac.

303. A trust agreement has been held to be an interest. *Nail* v. *American National Bank of Bristow*, 21 Fed. Sup. 385. The words "conveyance of any interest" would seem broad enough to include any type of conveyance.[2]

4. It is believed that the decision of the court below conflicts with a decision of the Court of Appeals for the District of Columbia in *U. S., ex rel. Warren*, v. *Ickes, Secretary*, 73 F. 2d 844.[3] It is a too well settled principle of law to require citations on the point that a subsequent legislative act cannot impair rights that were fixed under a former Act. The trial court in plain language held that the approval of the County Court of Okfuskee County meant nothing and that the agreement was void under Section 2 of the 1933 Act.

5. It is believed that the decision of the Court of Appeals is in conflict with the law announced in other cases by the Circuit Court of Appeals where Section 9 of the 1908 Act has been construed. In *U. S.* v. *Gypsy Oil Co.*, 10 F. 2d 487, a clear distinction is drawn between restrictions on allotted lands and restrictions against alienation by

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2. *Pluto Oil & Gas Company* v. *Miller* cites this Court's opinion in *U. S.* v. *Noble*, 237 U. S. 74, 35 Sup. Ct. 59 L. Ed. 844, on the point that an assignment of rents and royalties accruing under an oil and gas lease is an interest in the land.

3. In the *Warren* case the facts were that Warren had an attorney's contract covering an interest in inherited lands acquired by a full blood Indian. The contract was approved by the county court prior to the passage of the Act of Congress of January 27, 1933. It was held that Warren had prior rights by reason of the county court's approval under Section 9 of the 1908 Act.

heirs of deceased allottees.[4] It is believed that the opinion is in conflict with *Bradburn* v. *Shell Oil Company*, 173 F. 2d 815, where Section 9 of the 1908 Act is construed and the word "interest" is discussed.

6. It is believed that the court below was in error in holding that the funds coming into the hands of the trustee were restricted under the rule applied in *Chisholm* v. *House*, 160 F. 2d 632, and *House* v. *U. S.*, 144 F. 2d 555. The court cited no other cases to support its conclusions. In the *Chisholm* case the Indian had taken title by devise and when he attempted to convey after the passage of the Act of April 12, 1926, he was held to be restricted because the 1926 Act reimposed restrictions on devisees. There the Indian had taken title at a time when devisees were not restricted but when he tried to convey he was confronted with the 1926 Act. Here the conveyance to the trustee was made under the 1908 Act and was duly approved before the passage of the 1933 Act. We call attention to the fact that *House* v. *U. S.* 144 F. 2d 555, deals with the release of funds held by the Secretary, whereas, here we are concerned with funds, all of which were received by the trustee after approval of the trust agreement by the county court. No other cases are cited to support the trial court's opinion and it is our view that neither of the above cited cases apply here.

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4. In the *Gypsy Oil Company* case the 8th Circuit Court of Appeals said that the lease had been approved by the proper agency designated by Congress and approval by the Secretary was not necessary. The court here cited with approval *Gypsy Oil Company* v. *Clinton* by the Oklahoma Supreme Court, 220 Pac. 587, involving the same facts.

7. There was an issue in the trial as to when and by whom the deletions in the trust agreement were made. See deleted lines in Paragraphs 1, 2, 3, 6, 8, and 11. Tr. Vol 1, Pages 27-32. Those deletions are not material so far as restrictions are concerned as they would relate to the manner of handling funds by the trustee and here we call attention to the opinion of the legal division of the Indian Office and the relinquishment of all supervision by the Superintendent. Tr. Vol. 11, Page 233, 241. The Superintendent's letter says "Departmental supervision is hereby relinquished * * *", and that statement clearly indicates the attitude of the department. It was one of hands off so far as Cumseh s interest was concerned. The only copy of the trust agreement in the government files was the deleted copy. See Supt. Paul Fickinger's testimony, Tr. Vol. I, 88, 90. It would seem obvious that Supt. Landman would not have advised Davis, the Tidewater Oil Company and the Commissioner of Indian Affairs that all supervision was relinquished if the Superintendent had regarded the undeleted instrument as the true agreement, but regardless of this matter the trust was approved before the passage of the 1933 Act under Section 9 of the Act of May 27, 1908. The trial court's theory was, that the agreement was void and conferred no rights and that (not the deleted provisions) was the real basis of the judgment against the trustee.

## Conclusion.

For the reasons above set out we respectfully submit that the writ of certiorari should be granted.

Respectfully submitted,

W. F. SEMPLE,
Atlas Life Building,
Tulsa, Oklahoma,
*Attorney for Ruth Davis, Administratrix of John F. Davis, deceased.*

# APPENDIX.

## UNITED STATES COURT OF APPEALS
## TENTH CIRCUIT.

No. 5630—March Term, 1958

Appeal from the United States District Court for the Eastern District of Oklahoma.

John F. Davis, Trustee of the Estate of Cumseh Bear, deceased, *Appellant*,

vs.

Mary Jones, Administratrix of the Estate of Cumseh Bear, deceased; Alice Bear, Guardian of Janie Alene Bear, Rosina Louise Bear, John Allen Bear and Ivan Eugene Bear, minors; and United States of America, *Appellees*.

(April 11, 1958)

W. F. Semple for Appellant.

Creekmore Wallace (Jack Jenkins was with him on the brief) for Appellee United States of America.
Estate of Cumseh Bear, deceased, and Alice Bear, Guardian of Janie Alene Bear, Rosina Louise Bear, John Allen Bear and Ivan Eugene Bear, Minors.

Robert S. Griswold, Jr., Attorney, Department of Justice, Perry W. Morton, Assistant Attorney General, Frank D. McSherry, United States Attorney, and Roger P. Marquis, Attorney, Department of Justice, were with him on the brief) for Appellee UnitedStates of America.

Before BRATTON, Chief, and PICKETT and LEWIS, Circuit Judges.

BRATTON, Chief Judge:

John F. Davis, trustee of the estate of Cumseh Bear, a full-blood Creek Indian, hereinafter referred to as Cumseh, filed in the District Court of Okfuskee County, Oklahoma, a petition for the approval of his final report as such trustee. In the petition, the trustee sought approval and confirmation of the report and an adjudication of no liability to the trust estate except that disclosed by the report. The report was filed with the petition and it disclosed a balance due the trust estate in the sum of $1,261.72. The trust was created in 1932, and it terminated upon the death of Cumseh in 1954. The surviving heirs of Cumseh filed in the proceeding objections and exceptions to the report; and as cross-petitioners, they sought an accounting. Notice of the suit was served upon the United States under section 3 of the Act of April 12, 1926, 44 Stat. 239. The United States seasonably filed a petition for the removal of the proceeding to the United States Court under such section, and it was removed. A motion to remand was denied. Acting on its own behalf and on behalf of the heirs of Cumseh, the United States filed its complaint in intervention in which an accounting was sought. Some facts were stipulated and evidence was adduced. The court found among other things that during the existence of the trust period, the trustee received a total of $57,958.26; that credits aggregating $26,100 should be allowed; and that the trustee should be surcharged in the amount of $31,858.26. Judgment was entered against the trustee for the amount of the surcharge, with provision that the proceeds of the judgment, when paid or collected, should be deposited in

the office of the Area Director, Bureau of Indian Affairs, at Muskogee, Oklahoma, to be held for a benefit of the heirs of Cumseh and to be disbursed pursuant to the applicable rules and regulations of the Secretary of the Interior. The trustee appealed.

Error is predicated upon the denial of the motion to remand the proceeding to the state court. The substance of the argument is that in 1932 the trust agreement was approved by the County Court of Okfuskee County; that such approval operated to remove all federal restrictions upon the income accruing from the sale of oil and gas produced from the inherited land described in the trust agreement; and that therefore the proceeding was not subject to removal. Section 3 of the Act of April 12, 1926, supra, is a special statute relating to the removal of certain cases. It provides that in any suit in a state court of Oklahoma to which a restricted member of the Five Civilized Tribes, or a restricted heir or grantee of such Indian, is a party and claiming an interest in allotted lands or the income therefrom, notice of the pendency of such suit may be served upon the Superintendent of the Five Civilized Tribes; that the United States may then remove the suit to the United States Court in the manner and within the time therein specified; and that the United States Court may then hear and determine the suit. The fund constituting the trust estate herein involved was derived from the sale of oil and gas produced from land allotted to Louisa Roberts, afterwards Louisa Bear, a full-blood enrolled Creek Indian. The allottee executed an oil and gas lease covering the al-

lotted land, and oil and gas were being produced therefrom during her lifetime. The lease was executed with the approval of the Secretary of the Interior; and the income accruing therefrom prior to the execution of the trust agreement was paid to the Secretary in trust for the allottee, or her heirs. The allottee died intestate in 1929, leaving as sole and only heirs her husband, Cumseh, and her son Johnny Bear. Cumseh was a full-blood member of the Creek Tribe. All of his heirs were and are full-blood restricted members of the Five Civilized Tribes; and they were parties to the proceeding in the state court. The interest in the allotted land, together with the income therefrom, which Cumseh acquired by inheritance from the allottee was subject to restrictions against alienation. *Chisholm* v. *House*, 160 F. 2d 632. Though approved by the County Judge of Okfuskee County, the trust agreement did not operate to free from restrictions the income derived from oil and gas produced from such land and placed in the trust estate And the fund constituting the trust estate continued to be restricted after it passed by inheritance to the heirs of Cumseh. It is clear that in these circumstances, the proceeding was remivable. *House* v. *United States*, 144 F. 2d 555, Certiorari denied, 323 U. S. 781.

Complaint is made that the court erroneously surcharged the trustee for disbursements made from the trust fund to Cumseh or for his benefit. A fiduciary relation existed between the trustee and the cestui que trust, and the burden rested upon the trustee to show the nature of each challenged transaction; to show that the trust was

administered in accordance with the trust instrument; and to the trust *resposed* in him, *Chisholm* v. *House*, 183 F. 2d 698.

The court based its action in disallowing credit for the claimed disbursements in excess of $100 per month upon the insufficiency of the evidence. In support of its conclusion that the evidence was insufficient to warrant allowance of the claimed credit for such disbursements, the court found these subsidiary facts, among others. The trustee was a full-blood Indian enrolled as a member of the Creek Tribe. He was and had been tribal chief of the Creek Nation. He speaks both the English and the Creek language. He obtained a degree in law from a recognized law school; was a minister; and was a real estate agent. Cumseh was uneducated; spoke only the Creek language; could neither read nor write English; and signed his name by thumb print. The two were intimate friends, and the latter *responsed* complete confidence in the former. The trust agreement was approved by the County Judge of Okfuskee County but not by the Secretary of the Interior. The original instrument was recorded in the records of Creek County and was then mailed to the trustee. A copy was furnished to the surety company which executed as surety the bond of the trustee. And a copy found its way into the files of the Superintendent of the Five Civilized Tribes. A certified copy of the recorded instrument did not disclose any deletions. Neither did the copy furnished to the surety company. But a photostat copy of the instrument in the files of the Superintendent of the Five Civilized

Tribes contained several deletions. The general effect of the deletions was to leave the trustee free of any duty or obligation to obtain approval of his actions, either by the County Judge of Okfuskee County or the Superintendent of the Five Civilized Tribes. The original instrument as executed by the parties did not contain any deletions. The trust agreement provided that the trustee should pay to Cumseh the sum of $100 per month out of the trust funds and that any payments in excess of that amount should be made only with the approval of the Superintendent of the Five Civilized Tribes. The office of such Superintendent was never called upon to approve, and never did approve, any of the expenditures made by the trustee. Under the terms of the trust agreement, the trustee was required to deposit all funds belonging to the trust in the Citizens State Bank or the Okemah National Bank, in Okemah. The trustee failed to deposit in either bank a majority of the checks which he received from the oil company for royalties and he did not keep or maintain regular books or records of his administration of the trust funds. He attempted to show that the checks had been cashed and the funds paid directly to Cumseh; and he attempted to show that certain payments had been made to others for the benefit of Cumseh. But the evidence tending to support the contention of the trustee concerning the disposition of such funds in that manner was without merit and was a subterfuge. And in addition to these subsidiary facts, the court found specifically that the testimony of the trustee in relation to the checks and settlements reportedly made with

Cumseh from time to time during his lifetime was unworthy of belief. It would not serve any useful purpose to detail at length the evidence introduced at the trial. It is enough to say that we think the evidence, together with the inferences fairly to be drawn from it, was insufficient to discharge the burden resting upon the trustee; and that the court was warranted in disallowing the claimed credits for disbursements in excess of $100 per month.

The equitable doctrine of waiver or ratification is relied upon to protect the trustee against liability for the asserted infidelity to the trust. It is argued that Cumseh approved the disbursements by the trustee; that such approval constituted a waiver or ratification of the breach of the trust; and that therefore his heirs are estopped from attacking the actions of the trustee on the ground of such breach. A competent *cestui que* trust having knowledye of all the facts may authorize the trustee in advance to perform an act which would otherwise be a breach of the trust, or he may ratify such act after it has been done; and in either event he and those claiming under him are estopped from attacking the trustee upon the ground of the breach. But here the cestui que trust was illiterate; could not speak the English language; could not read or write; was seemingly indifferent to financial means beyond that required to obtain the necessities of life; and entertained a trustfull faith in the trustee. And it s fairly apparent that from time to time he thumb-printed receipts which purported on their fact to evidence distribution of royalty proceeds to him without knowing or understanding their effect or significance.

Viewed in the light of these facts, there is no sustainable basis for the effort of the trustee to escape liability upon the ground that the acts of Cumseh constituted an effective waiver or ratification of the breach of the trust which estops his heirs from attacking his actions upon the ground of such breach. 4 Bobart, Trusts & Trustees, page 2, Sec. 941; 2 Scott on Trusts Sec. 216; Restatement, Trusts Sec. 216.

Other contentions are advanced on behalf of the trustee. But they are bereft of merit and do not warrant discussion.

The judgment is affirmed.

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SEP 24 1958
JAMES R. BROWNING, Clerk

No. 317

# In the Supreme Court of the United States

OCTOBER TERM, 1958

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RUTH DAVIS, as Administratrix for JOHN F. DAVIS, Deceased, Trustee of the Estate of CUMSEH BEAR, Deceased, PETITIONER

*v.*

MARY JONES, Administratrix of the Estate of CUMSEH BEAR, Deceased; ALICE BEAR, Guardian of JANIE ALENE BEAR; ROSINA LOUISE BEAR, JOHN ALLEN BEAR and IVAN EUGENE BEAR, Minors; and UNITED STATES OF AMERICA

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*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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PERRY W. MORTON,
*Assistant Attorney General,*

ROGER P. MARQUIS,
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# In the Supreme Court of the United States

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RUTH DAVIS, as Administratrix for JOHN F. DAVIS, Deceased, Trustee of the Estate of CUMSEH BEAR, Deceased, PETITIONER

*v.*

MARY JONES, Administratrix of the Estate of CUMSEH BEAR, Deceased; ALICE BEAR, Guardian of JANIE ALENE BEAR; ROSINA LOUISE BEAR, JOHN ALLEN BEAR and IVAN EUGENE BEAR, Minors; and UNITED STATES OF AMERICA

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*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. 13-20) is reported at 254 F.2d 696.

### JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1958. A timely petition for rehearing

was denied on May 8, 1958. The time for filing a petition for a writ of certiorari was extended, by order of Mr. Justice Whittaker, dated July 29, 1958, to September 1, 1958. The petition was filed on August 28, 1958. The jurisdiction of this Court is invoked under 25 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether this suit charging a trustee with maladministration of a trust was properly removed to the federal district court under Section 3 of the Act of April 12, 1926, 44 Stat. 239, which provides for removal from the Oklahoma courts of suits involving restricted Indians claiming an interest in allotted lands or the income therefrom.

## STATUTES INVOLVED

Section 3 of the Act of April 12, 1926, 44 Stat. 239, provides in part:

> Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the

> trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. * * * *Provided*, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. * * *

Other statutes noted in the text are set forth in the Appendix, *infra*, pp. 8-9.

## STATEMENT

John F. Davis, trustee of the estate of Cumseh Bear, deceased, filed a petition in the Okfuskee County Court, Oklahoma, seeking approval and confirmation of his trustee's report and an adjudication of no liability to the trust estate except that disclosed by the report—which showed a balance in the account of $1,261.72. The surviving heirs of Cumseh Bear, all restricted Indians, filed objections and exceptions to the report, and cross-petitioned for an

accounting. Notice of the suit was served upon the United States pursuant to Section 3 of the Act of April 12, 1926 (*supra*), and the Government seasonably removed the case to the United States District Court. A motion to remand by Davis was denied. Acting on its own behalf and on behalf of the heirs of Cumseh Bear, the United States filed its complaint in intervention seeking an accounting.

The trust agreement had been executed in 1932 between Cumseh Bear, a restricted full-blood Creek Indian, settlor, and John F. Davis, Chief of the Creek Tribe, trustee, and was subsequently approved by the Okfuskee County Court. Under the agreement, Davis took legal title to certain lands which Cumseh had inherited from his wife, the original allottee thereof. These lands were subject to an outstanding approved lease conferring upon the lessee the right to extract oil and gas. Davis was to collect and manage the royalty income derived from the lease and to use it for the sole benefit of Cumseh. The trust was revocable and was to terminate at Cumseh's death. During the trust period, there was income amounting to some $57,000. Cumseh died in 1954, and this trustee's action followed.

Upon the evidence, the District Court found that the settlor, an illiterate man, had reposed full confidence in the trustee, who, in addition to being chief of the tribe, was a law graduate, a minister and a real estate agent; that Davis, during his administration of the trust, diverted some $31,000 of trust income; that Davis' efforts to show that this sum had been expended for trust purposes were unworthy of

belief and rested on subterfuge; and that the settlor, Cumseh, neither understood nor ratified the breaches of trust which had occurred. A judgment surcharging the trustee was entered, and the Court of Appeals affirmed.

## ARGUMENT

The concurrent findings of the courts below as to maladministration of the trust are not directly challenged in the petition and, in any event, they present no issue appropriate for determination by this Court. As to the question whether the case was properly removed to the United States District Court, we submit that the decision below was clearly correct. Moreover, contrary to petitioner's suggestion, there is no conflict of decisions and the case lacks general importance.

Section 3 of the 1926 Act (*supra*, p. 2) explicitly provides for removal when a restricted Indian claims an interest in allotted lands or the proceeds therefrom. *House* v. *United States*, 144 F. 2d 555, 559 (C.A. 10), certiorari denied, 323 U.S. 781. There is no dispute that the heirs of Cumseh Bear are restricted Indians. Moreover, the lands which he left to his heirs are allotted lands and the sums here involved are proceeds therefrom. It is immaterial that Cumseh Bear provided, during his life, that the income derived from exploitation of the oil and gas resources was to be managed by a trustee.

Petitioner's position is not aided by reference to Section 9 of the 1908 Act, as amended (*infra*, p. 8). That section provides that a full-blooded Indian who inherited allotted lands (a description fitting Cum-

seh Bear) might make a conveyance of such lands, or of an interest therein, by obtaining the approval of the appropriate county court. However, the Court of Appeals properly concluded, consistently with its earlier decisions in *Chisholm* v. *House*, 160 F. 2d 632, and *Bradburn* v. *Shell Oil Co.*, 173 F. 2d 815, that the establishment of a revocable trust, for the purpose of securing management of the income from allotted property, does not constitute a conveyance or alienation of an interest in the sense of the 1908 Act. Thus, even assuming that the trust was valid,[1] the property nevertheless remained restricted and the removal provision of the 1926 Act was properly held applicable.

This statutory provision is confined to actions instituted in the state courts of Oklahoma involving claims by restricted members of the Five Civilized Tribes in Oklahoma. The issue presented by this case can arise only in the Tenth Circuit. Moreover, in the form that it is here presented, the issue is unlikely to prove recurrent. Arrangements of trusteeship on behalf of restricted Indians of the Five Civilized Tribes have been regulated by specific act of Congress since 1933 (see Act of January 27, 1933, *infra*, pp. 8-9), the year following establishment of the trust involved in this case.

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[1] The assumption is not free from doubt. See Section 2 of the Act of January 27, 1933, *infra*, p. 9.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1958.

## APPENDIX

Section 2 of the Act of May 27, 1908, 35 Stat. 312, provides, in part:

> * * * *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: * * *

Section 9 of the Act of May 27, 1908, 35 Stat. 312, as amended by the Act of April 12, 1926, 44 Stat. 239, provides, in part:

> The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator: * * *.

Section 1 of the Act of January 27, 1933, 47 Stat. 777, provides, in part:

> That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unen-

rolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: * * *.

Section 2 of the Act of January 27, 1933, *supra*, provides, in part:

> The Secretary of the Interior be, and he is hereby, authorized to permit, in his discretion and subject to his approval, any Indian of the Five Civilized Tribes, over the age of twenty-one years, having restricted funds or other property subject to the supervision of the Secretary of the Interior, to create and establish, out of the restricted funds or other property, trusts for the benefits of such Indian, his heirs, or other beneficiaries designated by him, such trusts to be created by contracts or agreements by and between the Indian and incorporated trust companies or such banks as may be authorized by law to act as fiduciaries or trustees: * * * *Provided further*, That all trust agreements or contracts made or entered into prior to the date of approval of this Act, and all contracts or agreements made or entered into prior to said date providing for or looking to the creation of such trust or trusts shall be null and void unless such contracts or agreements shall have heretofore been approved by the Secretary of the Interior.

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